YOUNG YEAN CHIN & ORS v. QUEK YAK KANG & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
BADARIAH SAHAMID JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: J-02(NCVC)(A)-96-01-2015]
22 MARCH 2016

CIVIL PROCEDURE: *Affidavits – Affidavit in reply – Whether first defendant empowered to file affidavit on behalf of other defendants – Whether first defendant had authority to affirm affidavit on behalf of other defendants – Whether affidavit in reply rejected on flawed ground – Whether there was judicial appreciation of affidavit evidence – Whether there was miscarriage of justice*

The plaintiffs and the defendants were co-proprietors of a piece of undivided land ('the said land'). The plaintiffs had appointed a land surveyor to make measurements and partition on the said land. The plaintiffs then filed an originating summons ('OS') together with an affidavit in support submitting that all of them have agreed to partition the said land according to the proposed partitioning plan, except for the defendants who wanted the *status quo* to remain. For that reason, the plaintiffs applied for a court order to partition the said land and to terminate the co-proprietorship of the same. In opposing the said application, the defendants filed an affidavit in reply, affirmed by the first defendant. The plaintiffs argued that the defendants had failed to raise any ground to challenge the plaintiffs' application and that there was no averment to say that the first defendant was authorised by the other defendants to affirm the affidavit in reply. As such, it was submitted that there was no evidence by the second to the fifth defendants opposing the plaintiffs' application. The High Court Judge ruled that the sole affidavit filed by the first defendant did not disclose that the first defendant was empowered to file the affidavit on behalf of the other defendants. Accordingly, the plaintiffs' application was allowed. Dissatisfied with the said order, the defendants appealed. The defendants submitted that (i) the High Court Judge erred in dismissing the first defendant's affidavit based on the technical error resulting in the granting of the plaintiffs' application without any judicial appreciation of the affidavit evidence; this was a classic case of a miscarriage of justice when the affidavit in reply was rejected on a completely flawed ground; (ii) the reason given by the High Court Judge to disregard the affidavit in reply by the defendants on the ground that the first defendant who had deposed the said affidavit did not state that he had been authorised by the other defendants to affirm the said affidavit was so unreasonable, perverse and unsustainable; and (iii) the High Court Judge had erred in failing to consider the defendants' notice of application for extension of time to file further affidavit containing a review report and the proposed subdivision plan prepared by the defendants' own surveyor.

Held (dismissing appeal with costs)
Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

(1) Under s. 145 of the National Land Code, the court is empowered with a discretion to order the partition of any land owned under a co-proprietorship or to make any order that the court thinks just for the purpose of enabling the co-proprietorship to be terminated. This provision is available to any of the co-proprietors who wanted to terminate the proprietorship but is facing a problem when any of the co-proprietors will neither join in nor consent to the making of the application for partition jointly owned by them as in the case herein. (para 17)

(2) An affidavit by a deponent who is a plaintiff or defendant in any proceeding made on his or her behalf and on behalf of any co-plaintiff or co-defendant as the case may be must show that the deponent is authorised to affirm the affidavit on behalf of the co-plaintiff or co-defendant. An affidavit is a sworn statement that consists of averments of facts or otherwise which may be used as evidence of the matters deposed in the affidavit. The deponent of the affidavit must be able to prove the matters that he or she had averred in the affidavit. (para 19)

(3) To depose and affirm an affidavit on behalf of another and to be authorised to depose and affirm an affidavit on behalf of oneself as well as on behalf of the other party were two different things. The first defendant herein merely affirmed the affidavit in reply on behalf of the other defendants but he was not authorised to do so. Therefore, the trial judge was right not to rely on the affidavit. Without the affidavit in reply, there was no evidence for the trial judge to consider in answer to the plaintiffs' application. Thus, it was not quite accurate to say that the trial judge had failed to give sufficient judicial appreciation of the evidence. (para 20)

(4) According to the notes of proceedings, the originating summons was served on the defendants on 23 July 2014 and the period to file the affidavit in reply expired on 13 August 2014. The Deputy Registrar acceded to the defence counsel's request and directed the defendants to file the affidavit in reply on or before 27 August 2014 and fixed the case for further case management on 11 September 2014. When the case was again recalled for case management, the defendants' counsel requested for time to file the affidavit in reply. The court then fixed the case for final case management on 30 October 2014 before the trial commenced on 10 November 2014. The court had thus given indulgence to the parties especially the defendants to be ready with the trial. Further, the proposed partition plan submitted by the plaintiffs to the court through plaintiffs' affidavit in support had taken into consideration all the worries and issues raised by the defendants. (paras 21, 22, 23 & 26)

(5) Though the High Court Judge had disregarded the defendants' affidavit in reply, the appellate court may look at the evidence for the sake of justice of the case. This was permissible under s. 69(1) of the Courts of Judicature Act 1964 and r. 5(1) of the Rules of the Court of Appeal 1994 where it provides that hearing of a civil appeal by the Court of Appeal is by way of rehearing. Having done so in this case, the decision of the High Court Judge was correct. (paras 27 & 28)

Bahasa Malaysia *Headnotes*

Plaintif-plaintif dan defendan-defendan adalah pemilik bersama sebidang tanah yang tidak berbahagi ('tanah tersebut'). Plaintif-plaintif melantik juruukur tanah untuk membuat pengukuran dan pembahagian tanah tersebut. Plaintif-plaintif kemudian memfailkan saman pemula ('SP') bersama-sama dengan afidavit sokongan yang menghujahkan bahawa kesemua mereka bersetuju untuk membahagikan tanah tersebut menurut pelan pembahagian yang dicadangkan, kecuali defendan-defendan yang ingin mengekalkan *status quo*. Oleh itu, plaintif-plaintif memohon satu perintah mahkamah untuk membahagikan tanah tersebut dan untuk membatalkan milikan bersama. Dalam membantah permohonan tersebut, defendan-defendan memfailkan satu afidavit balasan, yang disahkan oleh defendan pertama. Plaintif-plaintif menghujahkan bahawa defendan-defendan gagal membangkitkan apa-apa alasan untuk membantah permohonan plaintif dan tidak menyatakan atau menegaskan bahawa defendan pertama diberi kuasa oleh defendan-defendan lain untuk mengesahkan afidavit balasan. Oleh itu, dihujahkan bahawa tiada keterangan oleh defendan kedua sehingga defendan kelima untuk membantah permohonan plaintif. Hakim Mahkamah Tinggi memutuskan bahawa afidavit balasan yang difailkan oleh defendan pertama tidak mendedahkan bahawa defendan pertama diberi kuasa untuk memfailkan afidavit bagi pihak defendan-defendan yang lain. Dengan itu, permohonan plaintif dibenarkan. Tidak berpuas hati dengan perintah tersebut, defendan-defendan merayu. Defendan-defendan menghujahkan bahawa (i) Hakim Mahkamah Tinggi terkhilaf dalam menolak afidavit defendan pertama berdasarkan kesilapan teknikal yang menyebabkan permohonan plaintif dibenarkan tanpa apa-apa penghargaan kehakiman keterangan afidavit; ini adalah kes klasik salah laksana keadilan apabila afidavit balasan ditolak atas alasan yang cacat; (ii) alasan yang diberikan oleh Hakim Mahkamah Tinggi untuk tidak mengambil kira afidavit balasan oleh defendan-defendan atas alasan bahawa defendan pertama yang mendepos afidavit tersebut tidak menyatakan bahawa dia diberi kuasa oleh defendan-defendan lain untuk mengesahkan afidavit tersebut adalah tidak munasabah, bertentangan dan tidak boleh dikekalkan; dan (iii) Hakim Mahkamah Tinggi terkhilaf apabila gagal mempertimbangkan notis permohonan defendan untuk lanjutan masa untuk memfailkan afidavit seterusnya yang mengandungi laporan semakan dan rancangan pecah bahagian yang dicadangkan oleh juruukur defendan sendiri.

A **Diputuskan (menolak rayuan dengan kos)**
Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

(1) Di bawah s. 145 Kanun Tanah Negara, mahkamah diberi kuasa dengan budi bicara untuk memerintahkan pembahagian mana-mana tanah yang
B dimiliki di bawah milikan bersama atau membuat mana-mana perintah yang mahkamah berpendapat adalah adil bagi tujuan membolehkan milikan bersama dibatalkan. Peruntukan ini adalah tersedia untuk mana-mana pemilik bersama yang ingin membatalkan milikan tetapi berhadapan dengan masalah apabila terdapat salah satu daripada pemilik
C bersama yang tidak bergabung dengan atau membenarkan permohonan pembahagian untuk tanah yang dimiliki bersama seperti dalam kes ini.

(2) Afidavit oleh deponen yang merupakan seorang plaintif atau defendan dalam mana-mana prosiding yang dibuat bagi pihaknya dan bagi pihak plaintif lagi satu atau defendan lagi satu harus menunjukkan yang
D deponen dibenarkan mengesahkan afidavit bagi pihak plaintif bersama atau defendan bersama. Afidavit adalah kenyataan bersumpah yang mengandungi penegasan fakta atau sebaliknya yang boleh digunakan sebagai keterangan perkara-perkara dideposkan dalam afidavit. Deponen afidavit harus membuktikan perkara-perkara yang ditegaskan dalam
E afidavitnya.

(3) Untuk mendepos dan mengesahkan afidavit bagi pihak yang lain dan untuk diberi kuasa untuk mendepos dan mengesahkan afidavit bagi pihak diri sendiri dan juga bagi pihak yang lain adalah situasi berbeza sama sekali. Defendan pertama di sini hanya mengesahkan afidavit
F balasan bagi pihak defendan-defendan yang lain tetapi dia tidak diberi kuasa berbuat demikian. Oleh itu, hakim bicara betul apabila tidak bergantung pada afidavit. Tanpa afidavit balasan, tiada keterangan untuk dipertimbangkan hakim bicara bagi menjawab permohonan plaintif. Oleh itu, tidak tepat untuk menyatakan bahawa hakim bicara gagal
G memberi pertimbangan kehakiman secukupnya ke atas keterangan.

(4) Menurut nota prosiding, saman pemula diserahkan kepada defendan pada 23 Julai 2014 dan tempoh untuk memfailkan afidavit balasan tamat tempoh pada 13 Ogos 2014. Timbalan Pendaftar menyetujui permintaan peguam pembelaan dan mengarahkan defendan-defendan memfailkan
H afidavit balasan pada atau sebelum 27 Ogos 2014 dan menetapkan kes untuk pengurusan kes seterusnya pada 11 September 2014. Apabila kes dipanggil sekali lagi untuk pengurusan kes, peguam defendan meminta masa untuk memfailkan afidavit balasan. Mahkamah kemudian menetapkan kes untuk pengurusan kes muktamad pada 30 Oktober 2014
I sebelum perbicaraan bermula pada 10 November 2014. Oleh itu mahkamah telah memberikan kelonggaran kepada pihak-pihak terutama sekali defendan-defendan untuk bersedia dibicarakan. Selanjutnya, pelan

pembahagian yang dicadangkan oleh plaintif-plaintif melalui afidavit sokongan plaintif-plaintif telah mengambil kira segala kebimbangan dan isu-isu yang dibangkitkan oleh defendan.

(5) Walaupun Hakim Mahkamah Tinggi telah mengetepikan afidavit balasan defendan-defendan, mahkamah rayuan boleh memberi perhatian kepada keterangan demi keadilan kes. Ini dibenarkan oleh s. 69(1) Akta Mahkamah Kehakiman 1964 dan k. 5(1) Kaedah-Kaedah Mahkamah Rayuan 1994 yang memperuntukkan bahawa perbicaraan rayuan sivil oleh Mahkamah Rayuan adalah melalui perbicaraan semula. Setelah berbuat demikian dalam kes ini, keputusan Hakim Mahkamah Tinggi adalah betul.

Case(s) referred to:
Bank Utama (Malaysia) Bhd v. Seri Mayhua Sdn Bhd & Ors [2000] 1 LNS 82 HC ***(refd)***
Sabah Bank Bhd v. Pemborong Keningau Sdn Bhd & Ors [1991] 3 CLJ 2590; [1991] 3 CLJ (Rep) 677 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69(1)
National Land Code, s. 145
Rules of Court 2012, O. 7 r. 2
Rules of the Court of Appeal 1994, r. 5(1)

For the appellant - Ramesh Sivakumar; M/s Ramesh & Co
For the respondent - Tan Chee Giap; M/s Soh Yok Lam & Co

[Editor's note: Appeal from High Court, Muar; Originating Summons No: 24NCVC-232-07-2014 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

[1] On 29 November 2014, the learned High Court Judge allowed the plaintiffs' originating summons dated 10 July 2014 against the defendants under O. 7 r. 2 of the Rules of Court 2012 (ROC 2012) to partition and hence terminate the co-proprietorship of a piece of undivided land known as Hakmilik Geran 85976 Lot No. 3406 Bandar Maharani Daerah Muar Negeri Johor ("the said land") with no order as to costs. Dissatisfied with the order, the defendants appealed against the whole decision of the learned High Court Judge.

[2] Parties will be referred to as plaintiffs and defendants as in the High Court.

A **Background Facts**

[3] At all material times, the plaintiffs and the defendants are co-proprietors of the said land. The plaintiffs had appointed a land surveyor to make measurement and partition on the said land accordingly. All the joint co-proprietors were agreed to it except for the defendants.

B

[4] The plaintiffs then filed the originating summons together with an affidavit in support affirmed by all the plaintiffs on 7 July 2014. In the affidavit in support, the plaintiffs averred that it was their intention to partition the said land into three separate lots and they have prepared a proposed partition plan drawn by a qualified surveyor. The proposed partition plan was exhibited as exh. 'QYK-2' in the affidavit in support.

C

[5] In the same affidavit in support, the plaintiffs also averred that all of them have agreed to partition the said land according to the proposed partitioning plan, except for the defendants who wanted the *status quo* to remain. For that reason the plaintiffs said they have filed the application by way of the originating summons to get a court order to partition the said land and terminate the co-proprietorship of the same. The plaintiffs intended that co-proprietors will have individual title on the said land based on the proposed plan.

D

E **[6]** In opposing this application, the defendants filed only one afidavit balasan. The afidavit balasan was affirmed by one Young Yean Chin, the first defendant, on 25 August 2014. In para. 1 of the afidavit balasan the deponent averred as follows:

> 1. Saya adalah merupakan salah seorang Defendan menurut prosiding ini dan sesungguhnya saya mengikrarkan affidavit ini bagi pihak Young Yean Khang, Young Yean Ning, Young Yean Yee & Khoo Kee Chen sebagai balasan kepada Afidavit Sokongan Quek Yak Kang, Lim Yok Lang & Quek Xiu Yi bertarikh 07.07.2014. Segala fakta-fakta yang dideposkan di sini adalah dalam pengetahuan saya dan adalah benar berasaskan kepada rekod-rekod yang berada dalam milikan dan simpanan saya yang mana saya mempunyai akses di mana keesahan dan kesahihannya adalah disahkan oleh saya hanya kecuali jika sekiranya dinyatakan sebaliknya oleh saya.

F

G

[7] At the hearing of the originating summons, the plaintiffs submitted before the High Court Judge that the defendants had failed to raise any ground to challenge the plaintiffs' application. It was argued that the afidavit balasan by Young Yean Chin was affirmed only by the first defendant. There was no averment to say that the first defendant was authorised by the other defendants to affirm the afidavit balasan. As such it was submitted that there is no evidence by the second to the fifth defendants opposing the plaintiffs' application.

H

I

High Court Decision

[8] The learned High Court Judge ruled that, the sole affidavit filed by the first defendant did not disclose that the first defendant was empowered to file the affidavit on behalf of the other defendants.

[9] The defendants did not provide any alternative plan, suggestion, or report for the court to consider. Accordingly, the plaintiffs' application was allowed.

This Appeal

[10] In the appeal, the first complaint by defendants is that, the learned High Court Judge had erred in dismissing the first defendant's affidavit based on the technical error resulting in the granting of the plaintiffs' application without any judicial appreciation of the affidavit evidence presented by the defendants. Learned counsel for the defendants submitted that this is a classic case of a miscarriage of justice when the affidavit in reply was rejected on a completely flawed ground. He also argued that the reason given by the learned judge to disregard the afidavit balasan by the defendants on the ground that the first defendant who had deposed the said affidavit did not in the affidavit state that he had been authorised by the other defendants to affirm the said affidavit is so unreasonable, perverse and unsustainable. This is because he submitted in the said afidavit balasan, there is a specific averment by the first defendant, the deponent of the said affidavit, as follows:

> Saya adalah merupakan salah seorang defendan menurut prosiding ini dan sesungguhnya saya mengikrarkan affidavit ini bagi pihak Young Yean Khang, Young Yean Ning, Young Yean Yee & Khoo Kee Chen sebagai balasan kepada Affidavit Sokongan Quek Kak Yang, Lim Yok Lang & Quek Xiu Yi bertarikh 07.07.2014.

[11] The second complaint by the defendants is that the learned judge had erred in failing to consider the defendants' notice of application for extension of time to file further affidavit containing a review report and the proposed subdivision plan prepared by the defendants' own surveyor.

[12] Learned counsel for the defendants contended that since 1975, the co-proprietors had agreed among themselves to the allotment of different portions of the land for their exclusive possession and enjoyment and such agreed division has been acted upon by the parties. Thus, the plaintiffs were said to have no right or interest in the portion occupied by the defendants or any of the houses built on it.

[13] The other issue raised by the defendants is that the proposed subdivision plan by the plaintiffs did not provide for proper access to, or will obstruct, the entrance to the defendants' house and the entrance to the adjacent house of the defendants will be blocked.

[14] It was also submitted for the defendants that this matter had come up before the High Court by the plaintiffs in the year 2014, thus the plaintiffs had ample time to prepare all the documents needed for the learned High Court Judge to agree with them.

[15] Learned counsel for the plaintiffs however contended that, there is no agreement signed by the co-proprietors to the allotment of different portions of the land for the defendants' exclusive possession and enjoyment. The proposed plan was based on the portion given in the Register of Title of the said land. The defendants' portion of the land was not deducted; if the defendants had to remove or make any changes on the houses based on the proposed plan, costs should be borne by the defendants.

[16] It was further submitted that the defendants did not prove their contention. The defendants' averments are mere words without any proof. There is no document or evidence supporting the defendants' contention. The plaintiffs' application is based on s. 145 of the National Land Code (NLC) since the defendants did not agree with the plaintiffs' proposed plan to partition the said land; and the court has the jurisdiction to entertain the plaintiffs' application and to make the order that it did.

Our Decision

[17] Under s. 145 of the NLC, the court is empowered with a discretion to order the partition of any land owned under a co-proprietorship or to make any order that the court thinks just for the purpose of enabling the co-proprietorship to be terminated. This provision is available to any of the co-proprietors who wanted to terminate the proprietorship but is facing a problem when any of the co-proprietors will neither join in nor consent to the making of the application for partition of jointly owned by them as in the case before us.

[18] However in the instant appeal the issue is not whether the court has or has no jurisdiction to order the partition of the said land when the defendants are not giving their consent or agreed to the partitioning of the said land; but whether the learned judge was right in his decision to disregard the afidavit balasan filed by the defendants. Learned counsel for the defendants contended that the decision is unreasonable, perverse and unsustainable because, we suppose, the want of authority by the first defendant to affirm an affidavit on behalf of the other defendants is apparently explained from the averment in para. 2 of the said afidavit balasan referred to earlier in this judgment.

[19] However in our opinion, an affidavit by a deponent who is a plaintiff or defendant in any proceeding made on his or her behalf and on behalf of any co-plaintiff or co-defendant as the case may be must show that the deponent is authorised to affirm the affidavit on behalf of the co-plaintiff or

co-defendant. An affidavit is a sworn statement consists of averments of facts or otherwise which may be used as evidence of the matters deposed in the affidavit. The deponent of the affidavit must be able to prove the matters that he or she had averred in the affidavit. Syed Ahmad Idid JC in *Sabah Bank Bhd v. Pemborong Keningau Sdn Bhd & Ors* [1991] 3 CLJ 2590; [1991] 3 CLJ (Rep) 677 held that affidavits are personal to those who depose them and if statements therein are incorrect, the deponents must be held liable (and in appropriate cases, punishable under the Penal Code). So it is not the business of anyone unless he is so authorised to depose to facts and much less for counsel to include contentions materials in their affidavits. Though in that case the deponent is a solicitor the principle is the same. This view was echoed by Sulaiman Daud JC (as he then was) in *Bank Utama (Malaysia) Bhd v. Seri Mayhua Sdn Bhd & Ors* [2000] 1 LNS 82; [2001] 2 AMR 1264 when His Lordship held that the deponent of an affidavit for any party in respect of any matter related to the party's affairs, business or dealings which is within the party's exclusive knowledge and which is filed in support of any cause or matter must be authorised by the party to affirm such affidavit.

[20] In the instant appeal the first defendant said that he had affirmed the afidavit balasan on behalf of the other defendants; and that is sufficient to cloth him with authority to affirm an affidavit on behalf of the second, third, fourth and the fifth defendants. In our view that is not enough. To depose and affirm an affidavit on behalf of another and to be authorised to depose and affirm an affidavit on behalf of oneself as well as on behalf of the other party are two different things. In this appeal the first defendant merely affirmed the afidavit balasan on behalf of the other defendants but he was not authorised to do so. Therefore, the learned judge was right not to rely on the affidavit. Without the afidavit balasan, there is no evidence for the learned judge to consider in answer to the plaintiffs' application. Thus it is not quite accurate to say that the learned judge had failed to give sufficient judicial appreciation of the evidence.

[21] With regard to the defendants' complaint that they had not been given enough time and that their application for extension of time to prepare and file their own surveyor's report on the proposal by the plaintiffs, we are not convinced. We have scrutinised the notes of proceedings (in RRT Jld 2(1) Bahagian B) before the learned judge and we observe that the case was called before the Deputy Registrar on 11 August 2014 in the presence of counsel for both sides. On that date, learned counsel for the plaintiffs informed the Deputy Registrar that the OS had been served on the defendants and learned counsel for the defendants requested for time to appoint a surveyor and informed the Deputy Registrar that he needed one month to file affidavit in reply because the survey report would only be ready within one month. According to the notes of proceedings, the OS was served on the defendants on 23 July 2014 and the period to file affidavit in reply expired on 13 August

2014. The Deputy Registrar acceded to the defence counsel's request and directed the defendants to file affidavit in reply on or before 27 August 2014 and fixed the case for further case management on 11 September 2014.

[22] On 11 September 2014, when the case was again recalled for case management, the defendants' counsel requested for time to file affidavit in reply to the plaintiffs' reply. The court then fixed the case for final case management on 30 October 2014 before the trial commence on 10 November 2014.

[23] It is obvious that the court had given indulgence to the parties especially the defendants to be ready with the trial. In the circumstances we see no merits in this submission by the defendants.

[24] With regard to the issue of the entrance to the defendants' houses or land, the argument is that the proposed partition plan by the plaintiffs will block if not close totally the entrance. The plaintiffs' reply to this issue is at paras. 9 and 10 of the plaintiffs' afidavit jawapan affirmed by the first plaintiff on 9 September 2014:

> 9. Sebagai membalas perenggan 8 dan 9 Afidavit Defendan tersebut yang dinafikan, saya mengatakan bahawa jalan keluar masuk ke bahagian tanah Defendan-Defendan yang ditanda sebagai "Plot C" jelas telah diperuntukkan/dirizabkan dalam Pelan Pecah Bahagian yang diekshibitkan sebagai "QYK-2" iaitu Jalan Said Tahir 2 yang terus sambung ke jalan utama iaitu Jalan Mohd Said Tahir.
>
> 10. Selanjutnya, saya sesungguhnya mengatakan pecah bahagian yang dipohon melalui Pelan Pecah Bahagian yang diekshibitkan sebagai "QYK-2" akan memastikan penggunaan optimum tanah tersebut termasuk bahagian Defendan-Defendan.

[25] The defendants also argued that the co-proprietors had agreed among themselves since 1975 to the allotment of different portions of the land for their exclusive possession and enjoyment and such agreed division has been acted upon by the parties. But the plaintiffs in their afidavit jawapan at para. 13 had denied this. In any event at paras. 10, 11 and 12 of the plaintiffs' afidavit jawapan it was averred that:

> 10. Selanjutnya, saya sesungguhnya mengatakan pecah bahagian yang dipohon melalui Pelan Pecah Bahagian yang diekshibitkan sebagai "QYK-2" akan memastikan penggunaan optimum tanah tersebut termasuk bahagian Defendan-Defendan.
>
> 11. Saya menafikan perenggan 10 Afidavit Defendan tersebut dan Defendan-Defendan diletakkan pada beban pembuktian yang ketat. Sekiranya apa yang didakwa oleh pihak Defendan adalah benar (yang mana tidak diakui), ia bukan alasan untuk menolak permohonan Plaintif melalui tindakan ini.

12. Secara khususnya, saya mengatakan pihak Defendan telah menggunakan lebih dari 7351 kaki persegi miliknya dalam tanah tersebut dan patut merobohkan dan/atau mengalihkan segala apa yang di luar kawasan 7351 kaki persegi tersebut atas kos dan perbelanjaan mereka sendiri sekiranya dakwaan dalam perenggan 10(4) Afidavit Defendan tersebut adalah benar (yang mana adalah tidak diakui).

[26] It is obvious that the proposed partition plan submitted by the plaintiffs to the court through plaintiffs' afidavit sokongan had taken into consideration all the worries and issues raised by the defendants.

[27] Though the learned High Court Judge had disregarded the defendants' afidavit balasan, (and we agree for the reason we have stated above), we as the appellate court may look at the evidence for the sake of justice of the case. This is permissible under s. 69(1) of the CJA 1964 and r. 5(1) of the Rules of the Court of Appeal 1994 where it provides that hearing of civil appeal by the Court of Appeal is by way of rehearing. That means that we can reassess the evidence adduced before the trial court.

[28] Having done so in this case we are unanimous that the decision of the learned High Court Judge is correct even though his reason for arriving at the decision may be wanting.

[29] Accordingly, we dismissed this appeal with costs of RM5,000 to the respondents and affirmed the High Court's decision. Deposit is to be refunded.